Lagerlöf & Leman
Final Draft
November 29, 1991/YS

The Government
The Ministry of Health and Social Affairs

OPINION

Appellant: Philip Morris AB, Drottninggatan 33,
111 51 Stockholm

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In re: Warning texts for tobacco

Matter: S-91/1249/J

I. In general

Philip Morris AB (below called "the Appellant") hereby has the opportunity to comment on the opinion of the National Board of Health and Welfare of November 1, 1991.

The National Board of Health and Welfare has not changed its position in response to what the Appellant has presented in its opinion of August 16, 1991.

The Appellant repudiates the arguments of the National Board of Health and Welfare on all counts.

2. Questions concerning freedom of the press and trade mark legislation

It is apparent from the final opinion of the National Board of Health and Welfare that it feels that it has the right to make a decision about a new warning text system that is in conflict

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with Swedish legislation since the protection of people's life and well-being weighs "heavier than the commercial interest of the most possible package advertising" in the opinion of the National Board of Health and Welfare. The Appellant would like to emphasize here that the purpose of the warning text system of providing consumers with information about possible health hazards associated with the use of tobacco is already fulfilled under the present system of warning texts. That is not what this matter is about. Instead, the appeal of the Appellant deals with the fact that the National Board of Health and Welfare has decided on limitations and restrictions in conflict with the Freedom of the Press Act and the Act on Trade Marks.

The Appellant, of course, contests that the National Board of Health and Welfare, with the support of the authorization given in the Warning Text Act, has any right at all to decide on a completely new warning text system which because of the size and formulation of the warning texts is in fundamental conflict with the Warning Text Act, the Freedom of the Press Act and trade mark legislation. The Appellant refers here to what has been stated in previous petitions and notes once again that the National Board of Health and Welfare has not taken the effort to meet the legal arguments in the petitions of the Appellant and the expert opinions that are enclosed along with them.

The National Board of Health and Welfare claims in its opinion that commercial package advertising for tobacco does not have any freedom of the press- or other constitutional protection against censorship or other interventions and restrictions that have come about as the result of legislation and refers to ch 1 s 9 of the Freedom of the Press Act and the prefaces to this regulation (prop. 1973:123 p 39 ff).

In ch 1 s 9 of the Freedom of the Press Act, it is prescribed that what is stipulated in law about the prohibition against commercial advertising, without hindrance of the Freedom of the Press Act, applies to the extent that the advertisement is used in the marketing of tobacco products. It is apparent from the prefaces to the regulation that what is considered to be commercial advertising is mainly newspaper advertisements. Advertising messages on inter alia posters and in brochures can also be referred to commercial advertising. Thus cigarette packages cannot be equated with an advertisement. The interpretation of the National Board of Health and Welfare that commercial tobacco advertising print is exempted from freedom of the press protection and that that which is protected by the Freedom of the Press Act only is such that in some sense can be called journalism is thus completely incorrect.

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The National Board of Health and Welfare even seems to imply that the Appellant has claimed that the Warning Text Act is in conflict with the Freedom of the Press Act or ch 2 s 13 of the Institute of Government Act. The Appellant has never claimed this. What the Appellant on the other hand has claimed is that the National Board of Health and Welfare, by changing its implementing regulations has now implemented warning texts that are in conflict with both the Warning Text Act and the Freedom of the Press Act.

The National Board of Health and Welfare further holds that neither the Act on Trade Marks nor international trade mark law guarantees proprietors of trade marks a general right to use their trade marks. This statement is completely wrong. It is in itself correct that a proprietor of a trade mark must accept certain restrictions in his right to a trade mark. However, the extent of e.g. labelling regulations must be of a moderate extent, which the labelling regulations now decided on by the National Board of Health and Welfare definitely are not. In this respect the Appellant refers to what the Appellant has stated in its previous petitions and what is stated in the expert opinions included in these petitions by Professor Ulf Bernitz, Professor Gunnar Karnell and Professor Lars Holmquist.

The claim by the National Board of Health and Welfare that the new warning texts only take up a little more than 1/5 of the surface of the package is clearly misleading. The relation between the surface of the warning text and the total surface area of the package lacks relevance since the National Board of Health and Welfare states in its decision that the warning texts shall be placed on the side "that has the largest surface". This means in principle that one of the sides of the cigarette package is completely lost.

Professor Ulf Bernitz states in his opinion (appendix 1 of the Appellant's petition of April 2, 1991 p 15-16) that trade mark proprietors in the area of tobacco should be able to successfully let the question of restrictions in their right to use their trade marks be heard by the European Commission, and if possible to have it tried by the Court on Human Rights in Strasbourg. Bernitz judges the possibilities of success in such a suit as good. According to Professor Gunnar Karnell, the decision of the National Board of Health and Welfare means that the trade marks in question cannot be used any longer, and that this can be equated with a decision about expropriation of the trade mark (appendix 3 of the Appellant's petition of April 2, 1991 p 2). The National Board of Health and Welfare has not met the arguments of Bernitz and Karnell at all. Instead the Board has briefly stated that there can be

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no "question of expropriation of the proprietorship of a trade mark" since the trade mark can still be "used both on the wrapping of the package and in newspaper advertisements". Once again, the Appellant must state that the National Board of Health and Welfare does not understand the legal content of the Appellant's arguments.

According to the National Board of Health and Welfare, it is reasonable taking into consideration the great health hazards of the use of tobacco to make use of a larger part of the surface for health warnings in order to obtain "necessary attention value". In addition, the National Board of Health and Welfare claims that today's knowledge about the seriousness and the extent of the injuries caused by tobacco is essentially more extensive and alarming than when the Warning Text Act was implemented. The National Board of Health and Welfare ignores the fact that the warning texts were changed only five years ago, and that since then no new facts have come to light that make it necessary to implement far-reaching changes in the warning text system. In addition, the National Board of Health and Welfare has not presented any investigation that shows that the attention value of the present warning text system is in need of improvement.

The Appellant appealed the warning texts of February 25, 1985 that the National Board of Health and Welfare decided on. On April 10, 1986 the government granted the Appellant's appeal regarding three of the warning texts, which were excluded because of this. Before this, the National Board of Health and Welfare on its own had already changed four of its warning texts. Thus the appeal by the Appellant of the decision by the National Board of Health and Welfare entailed that seven of the twelve warning texts that the Appellant appealed were changed. The National Board of Health and Welfare implies in its petition that the government rejected arguments of the Appellant, which the Appellant finds difficult to understand in light of the above.

Press ombudsman Hans Gunnar Axberger states in his opinion (appendix 3 of the Appellant's petition of January 30, 1991 p 2 and p 6-7) that using a strict interpretation of the Freedom of the Press Act it is doubtful whether the Warning Text Act can be applied without agreement with the manufacturers. In Axberger's opinion one can arrive at the conclusion that such a possibility exists only after legal-political considerations have been taken and after the matter is looked at in the light of what the tobacco industry actually accepts over a longer period of time. It is apparent from Axberger's opinion that space for deviation from the prohibition against censorship of the Freedom of the Press Act is very little. An expansion of the present system assumes, according to Axberger, inter alia

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the acceptance of the tobacco industry. Without going into the legal argument of Axberger's opinion in more detail, the National Board of Health and Welfare rejects this line of reasoning as "obviously unreasonable". The reason that is given for taking this position is that the Government, in its decision in 1986, rejected this interpretation. Besides this being completely incorrect, the National Board of Health and Welfare completely ignores the fact that there was no question of increasing the size of the warning text square at that time. Seen in this light, the reasoning of the National Board of Health and Welfare lacks relevance.

It is apparent from the proposal of the expert group of the National Board of Health and Welfare on December 20, 1989 (appendix 6 of the Appellant's petition of January 30, 1991 p 5) that the purpose of increasing the size of the warning texts is to "make more stringent the restrictions in the possibility for the manufacturer himself to determine the package decor". This is now contested by the National Board of Health and Welfare. Instead, the National Board of Health and Welfare states that the purpose is to reduce tobacco consumption. The Appellant would like to call to mind that the purpose of the Warning Text Act is to provide information about possible health hazards associated with the use of tobacco and not to decrease the consumption of tobacco. The statement by the National Board of Health and Welfare shows that it has not understood the purpose of the warning text system.

3. EC questions

The National Board of Health and Welfare has stated in its petition that it cannot judge exactly what the consequences of the EES agreement will be.

However, the Appellant has been in touch with the National Board of Trade, that has confirmed that the Directive 1989/622 of the EC regarding labelling of tobacco products is "one of the secondary EC legal documents that is judged to be relevant to integrate into the EES agreement and that the intention is that the agreement will come into effect on January 1, 1993". If the decision of the National Board of Health and Welfare should be upheld, and with the application of at least a ten-month respite for the implementation of the new rules, the new warning texts would apply only a few months. To decide on a new warning text system that is radically different from that of the EC must therefore be a step in completely the wrong direction.

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The EFTA countries have emphasized the importance of defending essential protective norms and have received a positive response for this. This is apparent from inter alia the report, Sverige och den Västeuropeiska Integrationen, Konsekvenser av ett Svenskt EG-medlemskap; Sweden and Western European Integration, Consequences of Swedish EC Membership, Trade Section of the Foreign Office, May 1991 p 35. According to page 53 of the same report, it is apparent that the areas where an adaptation today are regarded as problematic for Sweden are inter alia emissions and dangerous chemicals. Thus, no mention is made of warning texts for tobacco products. The Foreign Office has not regarded an adaptation to the warning text system of the EC as constituting a problem for Sweden. The EC Directive, as the Appellant has previously pointed out, is also as far reaching as the present Swedish rules about warning texts and declaration of contents on tobacco products.

The EC Directive has been issued with the support of Article 100 a of the Treaty of Rome, which is used to reduce trade barriers. The reason why the EC issued this directive is that the differences between the different countries' regulation of labelling of tobacco products is considered to constitute a trade barrier, and by doing so is a threat to the free movement of goods within the EC. Therefore, the member countries may not decide on stricter rules than those stated in the EC Directive. Great Britain has recently made a decision to implement warning texts that are to cover 6% instead of 4% of the large surfaces on a pack of cigarettes. The tobacco industry in Great Britain, however, has challenged this decision, and the matter will most likely be taken up by the EC Court. In this connection, the Appellant would like to mention that the Italian government has changed the Italian labelling regulations so that they are in agreement with the EC Directive. This was done after the administrative court in Lazio, Italy decided on April 19, 1991 that the Italian government could not require two warning texts to be placed on the back of a cigarette pack, and which would take up 8%, since this is in conflict with that which is stated in the EC Directive.

The Appellant would like to call the attention of the Government to the fact that in Article 8 item 1 of the EC Directive, appendix 1, it is stipulated that the member countries may not prohibit or restrict the sale of products that are labelled in accordance with the EC Directive. ("Member States may not, for reasons of labelling, prohibit or restrict the sale of products which comply with this Directive"). In addition, it is stipulated in Article 8 item 2 that requirements that have been set up for protection of public health may not entail any changes in the labelling regulations of the Directive. ("The provisions of this Directive do not affect the right of the Member States to lay

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down, in compliance with the Treaty, requirements concerning the import, sale and consumption of tobacco products which they deem necessary in order to protect public health, provided such requirements do not imply any changes to labelling as laid down in this Directive"). According to all available EC expertise, member countries may not decide on stricter rules than those of the Directive.

It should also be mentioned, for example, that the German and the English labelling regulations, in accordance with the EC Directive, especially stipulate that cigarettes that have been produced in another EC country to be imported with the warning texts that are required in the exporting EC country; the warning texts being translated into German and English respectively. The same, of course, applies in the other EC countries.

In light of the above, there is nothing that speaks in favor of the opinion of the National Board of Health and Welfare that only those EFTA countries that have previously had a "weaker" warning text system than that of the EC can be expected to adapt itself to the EC Directive.

In addition, the National Board of Health and Welfare claims that it has received an appeal for Sweden not to weaken its warning text system in advance, but instead that it should make the texts stricter before entry. The National Board of Health and Welfare even claims that wishes have been expressed for Sweden to continue to "assume international leadership in public health work". Because of these "appeals" and "wishes", the National Board of Health and Welfare seems to consider itself as having the right to make decisions that are in conflict with Swedish legislation and directives and guidelines issued by the government and the parliament. The Board's way of arguing shows that the National Board of Health and Welfare has still not understood that the National Board, in its capacity as a Swedish public authority, is bound by Swedish legislation and the directives and guidelines that are issued by the government and the Swedish parliament.

4. The individual texts

Once again, the Appellant would like to contest that the National Board of Health and Welfare has based its judgements "on comprehensive surveys and analyses of the accumulated scientific material available". The Appellant refers here to what has been stated in previous petitions.

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In its petition, the National Board of Health and Welfare contests that the criticism from the members of the scientific council of the National Board of Health and Welfare has been neglected even in those instances where the content of the text had to do with the area of expertise of the member. The National Board of Health and Welfare argues that only viewpoints about language have not been ascribed any decisive importance when formulating the texts.

This statement by the National Board of Health and Welfare is completely incorrect. Regarding text no 1 ("Smoking kills more than 20 persons a day in Sweden"), Per Bjurulf, professor of social medicine, has stated that the text borders on scare propaganda with the risk of giving rationalization and excuse effects. This statement can hardly be regarded as a "view about language". Regarding text no 10 ("Smoking contributes to the skeleton becoming more fragile. Older women are especially vulnerable") Göran Bauer, professor of orthopedic surgery, has stated that he does not consider the connection between osteopenia and bone fractures to be a self-evident one, but instead that there can be other reasons for the deficient firmness. This statement cannot either be regarded as a "view about language". Ragnar Rylander, professor of hygiene, does not feel that text no 12 ("Most people with asthma have hypersensitive bronchial tubes. Your tobacco smoke can aggravate the complaint") is based on scientific fact. Professor Rylander has expressed a similar opinion regarding warning text no 13 ("Children who are exposed to tobacco smoke more often suffer allergic complaints"). It is difficult to see the statements of Professor Rylander as only being regarded as views about language.

Regarding Text no 3 ("Tobacco smoke contains arsenic, lead, cadmium and many other harmful substances") the National Board of Health and Welfare admits that "knowledge about what substances or combination of substances that are responsible for the different health hazards is incomplete, but that the substances that are mentioned in the text by no means can be called not dangerous" and that it is "in principle, impossible to define with certainty a level of exposure that is not dangerous".

Arsenic, lead and cadmium are so-called trace elements that are present in tobacco smoke in such small quantities that they are clearly below that which is accepted for food-stuffs by the National Food Administration. Therefore, it is grossly misleading to claim in a warning text that the substances occur in harmful amounts, especially since the National Board of Health and Welfare now admits that there is no scientific basis for this. In the event that the National Board of Health and Welfare is convinced that all products that contain

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measurable quantities of these substances shall have warning texts, the National Board of Health and Welfare must issue warning texts for a large number of products since these substances are found in corresponding amounts in food-stuffs such as grain, vegetables, meat, and shellfish. In addition, the substances are also found in the water and air that all people daily come into contact with (see appendix 2 with references to literature). Once again, the Appellant would like to call to mind that the warning texts may only contain objective and neutral information about health hazards based on the results of research. This warning text, therefore is in obvious conflict with the Warning Text Act.

Regarding text no 10 ("Smoking contributes to the skeleton becoming more fragile. Older women are especially vulnerable") the Appellant once again would like to emphasize that the content of the texts shall be based on the results of research in the area and not only on the studies that can be used to support the views of the National Board of Health and Welfare. Even this text is thus in conflict with the Warning Text Act.

5. Concluding views

As has been stated above, the decision of the National Board of Health and Welfare is in conflict not only with Swedish constitutional law but above all with the EC Directive and Sweden's striving to adapt to the EC. Negotiations between the EC and the EFTA countries about the EES agreement are now in a delicate stage. To decide on an entirely new warning text system, at this time, that is diametrically opposed to the EC warning text system, in the view of the Appellant must be most unsuitable. The Appellant therefore petitions the Government once again to remit the decision of the National Board of Health and Welfare with instructions that all warning texts shall be in agreement with the EC Directive and that the handling of warning text matters in the future shall be done in a correct way.

Stockholm November 29, 1991

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